TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. 207.

E. F. BLACK, APPELLANT,

vs.

WALTER P. JACKSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED JULY 29, 1898.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 351.

E. F. BLACK, APPELLANT,

vs.

WALTER P. JACKSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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1 In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error. } No. 572.

UNITED STATES OF AMERICA, *Territory of Oklahoma,* } *ss:*

Be it remembered that in the supreme court of the Territory of Oklahoma, at the city of Guthrie, in said Territory, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit, petition in error and case-made, thereto attached as "Exhibit A."

2 Filed April 10th, 1897.

In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error.

Petition in Error.

The said plaintiff in error complains of said defendant in error for that the said Walter P. Jackson, at the February term, 1897, of the district court of Kay county, Oklahoma Territory, recovered a judgment, by the consideration of said court, against the said E. F. Black, in a certain action then pending in the said court, wherein the said Walter P. Jackson was plaintiff and E. F. Black was defendant. A certified transcript of the record of said court and the original "case-made," duly certified and attested, is hereto attached, marked "Exhibit A," and made a part of this petition in error; and the said E. F. Black avers that there is error in the said record and proceedings in this, to wit:

First. That said court erred in overruling the demurrer of the defendant in said action, plaintiff herein, to the "application for mandatory injunction" of plaintiff in said action, defendant herein.

Second. That said court erred in sustaining the demurrer of plaintiff in said action, defendant herein, to the answer of defendant in said action, plaintiff herein.

That said court erred in assuming and exercising jurisdiction over the subject-matter of said action.

Plaintiff asks proper relief.

G. J. MECHLING AND
S. H. HARRIS,
Att'y. for Pl'ff in Error.

3 TERRITORY OF OKLAHOMA, }
Noble County. }

We, the attorneys of record for the defendant in error in th above-entitled action, hereby waive the issuance and service o summons in the above-entitled cause and hereby enter a genera appearance in said cause for the defendant in error therein.

Dated this 10th day of March, 1897.

E. BEE GUTHREY,
Attorney for Defendant in Error.

EXHIBIT A.

In the District Court of Kay County, Oklahoma Territory.

WALTER P. JACKSON, Plaintiff, }
vs. } No. 678.
E. F. BLACK, Defendant. }

Case-made.

Be it remembered that heretofore, to wit, on the 4th day of De cember, 1896, the plaintiff, Walter P. Jackson, commenced his actio against said defendant by filing in the district court of Kay count his petition, which is in words and figures following, to wit:

In the District Court of the 4th Judicial District in and for Ka County, Oklahoma Territory.

WALTER P. JACKSON, Plaintiff, }
vs.
E. F. BLACK, Defendant. }

4 *Application for Mandatory Injunction.*

Comes now Walter P. Jackson, the plaintiff in the above-entitle cause, and for cause of action against the defendant charges an alleges as follows, to wit:

First.

That this plaintiff has a homestead entry upon the S.W. ¼ sec. 2 T. 28, R. 2 east, I. M., and that said homestead entry was made o November 17th, 1896, as evidenced by the copy of the receiver duplicate receipt, hereunto attached, marked "Exhibit "A," and mad a part of this petition.

Second.

Prior to the 27th day of November, 1896, this land has been em braced in the homestead entry of the defendant, E. F. Black, an said entry was finally held for cancellation by the Hon. Secretar of the Interior in his decision of October 26th, 1896, wherein th

defendant's, Black's, motion for review was denied, and the plaintiff herein, Walter P. Jackson, was allowed to make entry of the land.

Affiant further states that notwithstanding the final decision of the Hon. Secretary of the Interior cancelling the homestead entry of the defendant herein and awarding the land to this plaintiff, and notwithstanding the fact that said contest has been finally adjudicated in the Land Department, and notwithstanding the fact that this plaintiff has now at this time the homestead entry on this tract of land, and that all rights which the defendant has heretofore held therein has been dismissed, that the said defendant continues to remain in possession of the west 80 acres of said tract of land, and refuses and neglects to vacate the same, although requested by this plaintiff so to do; that said defendant now at this time wrongfully holds possession thereof and refuses and neglects to give possession of the same.

Affiant further states that the said defendant has upon said tract of land a barb-wire fence, a well curb, and other improvements attached to the realty.

Affiant further states that said defendant is financially unable to respond in damages for the injury that he is now causing this plaintiff by his trespassing upon the land, and that this affiant has no adequate remedy at law other than by this suit now filed.

Wherefore affiant prays that the court grant him a mandatory injunction, enjoining said defendant from entering upon or in any manner whatsoever trespassing upon or using any portion of the land embraced in the homestead entry of this plaintiff, and that said defendant be further enjoined from removing or in any manner destroying the fence, wells, or other improvements on said lands which are permanently attached thereto.

Affiant further asks for judgment against said defendant for the costs of this action, statutory attorney's fees, and such other and further relief as the court may deem just and right.

WALTER P. JACKSON.

Subscribed and sworn to before me this 4th day of December, 1896.

F. M. BEALE,
Dep. Clerk of District Court.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *June* 18, 1896.

Vol. 23, No. 181.

WALTER P. JACKSON and THEODORE VAN ANTWERP
vs.
EPHRIAM F. BLACK.

The Commissioner of the General Land Office.

SIR: Ephraim F. Black and Theodore Van Antwerp have appealed from the decision of your office dated June 29, 1895, in the case of said Jackson and Van Antwerp *v.* Ephriam F. Black, hold-

ing homestead entry No. 3071 upon the S. W. ¼ of sec. 26, T. 28 N., R. 2 E., Perry land district, Oklahoma, subject to the prior right of Jackson, and dismissing Van Antwerp's contest.

Said decision fairly sets forth the facts in this case, and the conclusion therein reached is sustained by the testimony and is in conformity with law and the decisions of the department and is hereby affirmed.

The papers in the case are herewith returned.

Very respectfully, JNO. M. REYNOLDS,
Acting Secretary.

Copy.

I, Louis Davis, register of the U. S. land office at Perry, O. T. certify that the above is a true and correct copy of the decision of the Hon. Secretary of the Interior in the case of Walter P. Jackson and Theodore Van Antwerp *vs.* Ephriam F. Black, and that service of said decision was duly made upon L. P. Hudson, attorney of record for said Black, on the 3 day of August, 1896.

LOUIS DAVIS, *Register.*

O K.
M. C. L.

Copy.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *October* 26, 1896.

7 WALTER P. JACKSON and THEODORE Van Antwerp *vs.* EPHRIAM F. BLACK. } Motion for Review Perry, O. T.

The Commissioner of the General Land Office.

SIR: The defendant in this case has filed a motion for review of departmental decision rendered therein on June 18, 1896 (L. & R. No. 336, p. 179), but no new question of law or fact is presented and it is therefore denied.

The papers are herewith returned.

Very respectfully, DAVID R. FRANCIS, *Secretary.*

I, Louis Davis, register of the U. S. land office at Perry, O. T. hereby certify that the above is a true and correct copy of the Hon. Secretary's decision on the motion for review in the case of Walter P. Jackson and Theodore Van Antwerp *vs.* Ephriam F. Black, and that service thereof was duly made upon L. P. Hudson, attorney of record for the said Black, on the 13th day of November, 1896; and I further certify that the records of this office show that on the 17th day of November, 1896, the said Walter P. Jackson made homestead entry of the tract of land involved in this controversy, and that said entry is now on record, and that since said 17th day of Novem

ber, 1896, no further papers has been filed in this office with relation to said tract of land.

O K.

M. C. L.

LOUIS DAVIS, *Register.*

On which petition is indorsed the following: In the district court of the 4th judicial district in and for Kay county, Okla.
8 Territory. Walter P. Jackson *vs.* E. F. Black. No. 678. Petition. Filed December the 4th, 1896. J. H. Havighorst, clerk. F. M. Beale, dep'y. Howe and Guthrey, att'ys for Jackson.

And afterwards, to wit, on the 2nd day of January, 1897, said defendant filed in said court his answer to said petition; which answer is in the words and figures following:

TERRITORY OF OKLAHOMA, } *ss:*
County of Kay, }

In the District Court.

WALTER P. JACKSON, Plaintiff, }
vs. } Answer.
EPHRIAM F. BLACK, Defendant, }

1st defence. Comes now the defendant and for answer to plaintiff's petition says:

That he is and has been residing on this land with his family and has valuable improvements thereon, and that he should not be deprived of the use thereof and the possession of the same without the right to a trial thereof by jury, and that if the matters stated in plaintiff's petition do give him any cause of action against this defendant that said plaintiff has a plain and adequate remedy at law for the possession of said land, and that defendant should not be deprived of that which he has in his possession by injunction.

2nd defence. Defendant, for a further answer, alleges:

That on the 16th day of September, 1893, after 12 o'clock noon, central standard time, when the signal of opening was given, this defendant ran from the 100-foot strip along the south line of the State of Kansas that had been measured and staked off by those in charge under the President's proclamation and entered upon and made settlement on and filed his homestead entry for said land at the U. S. land office at Perry, Oklahoma, on the 31st of October, 1893; that plaintiff herein filed a contest against said entry.
9 That at the trial it was proven and admitted by the said Jackson that he, when the signal was given on the day of the opening, September 16, 1893, ran from a point on the south side of the Chilocco reservation to the land in question.

That said south side of said Chilocco reservation is three and one-half miles south of the southern boundary line of the State of Kansas and within the boundary lines of the country known as the Cherokee outlet.

That Congress provided for the opening of this country to settlement by an act of Congress approved March 3, 1893, which is hereby referred to and made a part of this answer.

That the President of the United States, in conformity to the act of Congress, by proclamation, dated August 19, 1893, which is made a part of this answer, ordered the country known as the Cherokee outlet opened to settlement at 12 o'clock noon, central standard time, of September 16, 1893.

That said proclamation defined the boundary lines of the country to be opened to settlement, prescribed the rules governing said opening and the land upon which intending settlers would be permitted to go prior to the hour of opening.

Said proclamation did not give permission to any one to run from the south side of said Chilocco reservation, and plaintiff herein violated said proclamation and disqualified himself to enter and hold lands in the Cherokee outlet by going to said south side of said land known as the Chilocco reservation prior to 12 o'clock noon of September 16, 1893, and making the race from said point to said land.

That said violation of the President's proclamation disqualified plaintiff to enter or hold said land, and that the same was called to the attention of the land officers, but that they misinterpreted and misconstrued said proclamation of August 19, 1893, and found that plaintiff was not disqualified by reason of having gone to the south side of said Chilocco reservation, and was not thereby a sooner as defined in said proclamation.

That defendant duly appealed to the Commissioner of the General Land Office, and from that officer to the Secretary of the Interior; that each of said officers misconstrued said proclamation and misinterpreted the same, to the detriment and injury of this defendant.

That defendant duly filed a motion for review, which motion was denied, and that this defendant has now exhausted all of his remedies in the Land Department of the United States.

Defendants further alleges that by reason of said officers mistaking the law and misconstruing the President's proclamation of August 19, 1893, opening said country to settlement, his said entry was ordered cancelled, and plaintiff, although disqualified as above set forth, allowed to make entry.

Defendant therefore asks that the court construe the sooner clause of said proclamation of August 19, 1893; that plaintiff be disqualified to enter and hold lands under said proclamation, and that defendant be permitted to remain in the possession thereof, and for such other and further relief as to the court may seem just and proper.

G. J. MECHLING,
Att'y for Defend.

TERRITORY OF OKLAHOMA, } ss:
County of Kay, }

E. F. Black, being duly sworn, on his oath says that he is the defendant in the above action; that he has heard read the foregoing answer, knows the contents thereof, and that the facts stated therein are true.

E. F. BLACK.

Subscribed and sworn to before me this 2nd day of January, 1897.

——— ———.

11 Which answer is indorsed as follows: No. 678. In district court. W. P. Jackson *vs.* E. F. Black. Answer. Filed Jan'y 2, 1897. J. H. Havighorst, clerk, by F. M. Beale, dep. G. J. Mechling, att'y for defendant.

And afterward, to wit, on the 15th day of Feb., 1897, the parties of said action appeared in court by their respective attorneys, and the defendant asked leave of court to withdraw his answer to the petition of plaintiff and file a demurrer to said petition.

Whereupon the court made the following order:

"Now, upon this 15th day of February, 1897, defendant asks leave of the court to withdraw his answer heretofore filed herein and to file a demurrer to the petition of the plaintiff, which is granted by the court, and defendant is given until the 23 day of February, 1897, to further plead herein, on condition that in case the demurrer of defendant to plaintiff's petition be overruled, defendant will immediately file his amended answer to the petition."

And afterwards, to wit, on the 23 day of January, 1897, said defendant filed his demurrer to the petition of plaintiff in the words and figures following:

In the District Court of Kay County, Territory of Oklahoma.

WALTER P. JACKSON, Plaintiff, }
vs. } Demurrer.
E. F. BLACK, Defendant. }

Defendant demurs to the so-called "application for mandatory injunction" in this case for the following reasons:

1st. That said document is not a petition and does not contain the necessary title and commencement as prescribed by
12 statutes of this Territory.

2nd. That said document termed an "application for mandatory injunction" does not state facts sufficient to constitute a cause of action.

3rd. That the court has no jurisdiction of the subject of the action

sought to be presented in said "application for mandatory injunction."

G. J. MECHLING AND
S. H. HARRIS,
Attorneys for Defendant.

And afterwards and upon the said 23 day of February, 1897, said cause *coming* on for hearing upon the demurrer of defendant to the petition of plaintiff, and upon consideration thereof the same was by the court overruled; to which ruling of the court the defendant duly excepted and still excepts; and thereupon defendant asked permission to answer the petition and application of plaintiff for a mandatory injunction; which permission was granted by the court.

Whereupon, on the said 23 day of February, 1897, defendant filed his amended answer to the petition of plaintiff, which is in the words and figures following, to wit:

In the District Court of Kay County, Oklahoma Territory.

WALTER P. JACKSON, Plaintiff,
vs.
E. F. BLACK, Defendant. } Answer.

For amended answer to the petition or "application for mandatory injunction" herein, defendant states:

1st. That he has been residing upon the land described in plaintiff's petition since about the 16th day of September, 1893, claiming a right thereto under and by virtue of the laws of the United
13 States, and was at the time of settlement of said land and has ever been since a legally qualified homestead claimant for said land, and had done no act of any kind or nature since the said 16 day of September, 1893, that has disqualified him to hold said land as a homestead.

That on the 31 day of October, 1895, he filed a homestead entry upon said land, and afterwards the plaintiff herein filed a contest against the entry of the defendant upon the ground that plaintiff's settlement upon said land as a homestead claimant was prior to that of defendant and prior to the filing of the homestead entry by defendant.

That it has been finally determined and decided by the Land Department of the United States that defendant's settlement upon and entry of said land was subsequent to that of plaintiff, and defendant's homestead entry cancelled and plaintiff allowed to make homestead entry upon said land upon the sole ground that plaintiff's settlement upon said land was prior to the settlement and homestead entry of the defendant.

That defendant during the time that he has resided upon said land has continued to place thereon lasting and valuable improvements, which are in the aggregate worth about the sum of $500.00, and defendant claims to be entitled to the benefit of the laws of the

United States and of the Territory of Oklahoma relating to occupying claimants, and that his rights cannot be disposed of a case in equity before the court only.

2nd. For further answer and defense to plaintiff's action this defendant says that he was on the 16th day of September, 1893, and ever since has been a native-born citizen of the United States and in all respects qualified to make homestead entry upon the land in question, and on the said 16th day of September, 1893, after 12 o'clock, central standard time, defendant, when a signal indicating that the moment for starting from the outer line of the Cherokee out-
14 let was given, ran from the 100-foot strip along the south line of the State of Kansas that had been measured, staked off, and reserved as a gathering place for those who desired to run for lands in the Cherokee outlet, and made all possible haste to secure and settle upon a suitable piece of land as a homestead.

That there were many thousands of people along said line, more than could secure homes in said outlet, allowing one hundred and sixty acres to each qualified entryman.

That the plaintiff herein, not observing the law, proclamation of the President, and rules governing the opening of said lands to settlement, and for the purpose of gaining an unlawful and undue advantage of defendant and others seeking a home in said outlet, crossed said 100-foot reserve around the outer boundary of said lands prior to 12 o'clock noon, central standard time, September 16th, 1893, and unlawfully and wrongfully entered upon the lands embraced within said outlet and within said 100-foot reservation known as the Chilocco reservation, and at the hour of noon, when said outlet was opened to settlement, plaintiff started on the race for a home from the south line of said Chilocco reservation and about three and one-half miles south of said 100-foot reservation along the northern boundary of said Cherokee outlet, and thereby wrongfully, unlawfully, and unjustly started in the race for a home three and one-half miles in advance of this defendant and others who observed the law of Congress opening said lands to settlement and the President's proclamation pursuant thereto; that plaintiff's prior settlement was wholly by reason of said advantage.

That said plaintiff filed in the United States land office at Perry, O. T., contest against the homestead entry of defendant made
15 upon the land described in plaintiff's petition on the 31st day of October, 1893, and as grounds for said contest alleged and claimed that the plaintiff settled upon the land in question and claimed the same as his homestead prior to settlement and homestead entry of defendant.

That upon the trial of said contest it was conclusively proven and admitted by plaintiff that plaintiff had started upon the race from the south line of the Chilocco reservation, as aforesaid.

That upon the trial and hearing of said contest the register and receiver of the land office at Perry, O. T., from the evidence that said plaintiff had started upon the race from the point and in the manner hereinbefore mentioned, and also that plaintiff's settlement upon and claim of said land was prior to that of defendant, and the

qualification of said plaintiff to acquire a homestead on account of his having entered upon said land in violation of the act of Congress opening the same to settlement and the President's proclamation pursuant thereto, was directly in issue between plaintiff and defendant in said contest case. But the register and receiver of the land office, even though finding from the evidence and admissions of plaintiff that he had so entered upon said land, misunderstood and wrongfully interpreted and misapplied the law in relation to the qualification of plaintiff to take and hold said land as a homestead, and expressly found as a matter of law that plaintiff was not disqualified as a sooner by reason of having entered upon said lands in the manner aforesaid.

That defendant herein duly appealed from the decision of said register and receiver to the Commissioner of the General Land Office and presented to said Commissioner the same question with reference to the disqualification of plaintiff to acquire title to
16 said land as a homestead, and said Commissioner misapplied the law and wrongfully and unlawfully sustained the conclusion of the register and receiver in that regard.

That the defendant then appealed to the Secretary of the Interior, to whom the same legal question was submitted, and said Secretary misapplied the law in relation to the qualification of plaintiff and wrongfully and unlawfully sustained the said findings of the Commissioner of the General Land Office.

That defendant duly filed his motion for review in said case, in which said question as to the qualification of plaintiff was presented, and urged a reconsideration and reversal, and said Secretary, still misunderstanding and misapplying the law, wrongfully and unlawfully refused the defendant a review in said contest, and wrongfully and contrary to law cancelled the homestead entry of defendant and permitted plaintiff to make homestead entry of said land, although plaintiff was at the time and still is wholly disqualified to acquire title to said land based upon a prior settlement by reason of his having entered upon said Cherokee outlet in violation of law.

That plaintiff, by reason of his disqualification as aforesaid, can never acquire the title of the land in question, and can never acquire a greater estate therein than a trust estate for the sole benefit of this defendant.

That defendant is lawfully entitled to reside upon said land as a homestead and acquire the title thereto by compliance with the laws of the United States and the rules of the Land Department.

That plaintiff, being disqualified to acquire title to said land, should not be heard in this action to the demand that defendant be ejected from said land and his home and improvements thereon, all of about the value of $300.

17 Defendant further says that if he is ejected from said land and his home and improvements thereon by order of this court he verily believes and so states the fact to be that said plaintiff will relinquish to the Government of the United States for a valuable consideration all his claim to and interest in said land,

and that the same will be entered as a homestead by some other person qualified to enter and hold the same and a stranger to the disqualification and wrongful acts of the plaintiff herein.

That said land, with the improvements thereon by this defendant, could be transferred in the manner aforesaid for the sum of $6,000.00.

Defendant further says that he has been by temporary order of this court restrained from exercising the right of possession and control over all of said land, with the exception of about five acres occupied by his dwelling and improvements immediately surrounding the same.

That he is ready and willing to execute to plaintiff a good and sufficient bond to compensate him for all loss of every kind or nature occasioned by defendant's occupancy and detention of said five acres and improvements, provided defendant is allowed to retain his possession thereof and so remain in position to assert his rights to all of said land as soon as he can possibly do so in accordance with law.

Wherefore defendant prays:

First. That plaintiff be not allowed to further maintain his action against him for the possession of said land or any part thereof.

Second. That in the event that defendant's first prayer is not granted by the court, then that plaintiff be denied the right to maintain his action to the extent of wholly ejecting defendant from said five acres and his dwelling and improvements
18 situated thereon until such time as plaintiff shall acquire a patent to said land and defendant be in a position to commence a suit for the purpose of having the title of plaintiff so acquired declared by the court to be held in trust for this defendant.

Defendant further prays that in the event his first prayer is granted by the court that plaintiff be taxed with all the costs of this case, and in the event that defendant is allowed to retain said five acres and improvements thereon that the costs of this action be divided equally between the parties.

E. F. BLACK,
By G. J. MECHLING AND
S. H. HARRIS.

TERRITORY OF OKLAHOMA, } ss:
Kay County, }

E. F. Black, being first duly sworn according to law, says that he is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that all the allegations, statements, and averments therein contained are true as he verily believes.

E. F. BLACK.

Subscribed and sworn to before me this 23rd day of February, 1897.

J. H. HAVIGHORST,
Clerk District Court,
By F. M. BEALE, *Deputy.*

And afterwards and on the 26th day of February, 1897, said cause came on for hearing upon the answer of defendant and the general demurrer of plaintiff considered as filed thereto, and upon consideration thereof said demurrer was sustained upon the ground that defendant's answer does not state facts sufficient to constitute a defense to plaintiff's petition; to which ruling of the court defendant excepted and still excepts, and thereupon the court made the orders and findings set forth in the journal entry then and
19 there reduced to writing, signed by the court, and entered of record upon the journal; which journal entry and orders and judgment of the court is in words and figures following:

In the District Court of Kay County, Territory of Oklahoma.

WALTER P. JACKSON, Plaintiff,
vs.
E. F. BLACK, Defendant.

Journal Entry.

Now, upon this 15th day of February, 1897, defendant asks leave of the court to withdraw his answer heretofore filed herein and to file a demurrer to the petition of plaintiff, which is granted by the court, and defendant is given until the 23rd day of February, 1897, to further plead herein, on condition that in case the demurrer of defendant to plaintiff's petition be overruled defendant will immediately file his amended answer to the petition.

And now, upon this 23rd day of February, 1897, this cause comes on for hearing upon the demurrer of defendant to the petition of plaintiff, and upon consideration thereof the same is overruled; to which ruling of the court the defendant duly excepts.

And thereupon defendant asks permission to answer the petition and application of plaintiff, which is accordingly granted by the court.

And now, upon this 26th day of February, 1897, the same being one of the regular term days of the regular February term, 1897, of the above-entitled court, this cause comes on for further hearing upon the amended answer of the defendant and the demurrer considered filed thereto by the plaintiff, upon the ground that said answer
20 does not state facts sufficient to constitute any defense to the cause of action stated in plaintiff's petition or application for mandatory injunction, plaintiff appearing by E. Bee Guthrey, his attorney, and defendant appearing by S. H. Harris, his attorney, and upon consideration of said matter the court finds that said answer does not state facts to constitute any defense to the cause of action stated in plaintiff's application for mandatory injunction herein, and said demurrer is sustained upon the grounds stated herein; to which finding, ruling, and order of the court defendant duly excepts, and defendant refusing and declining to ask permission to further plead to the application of plaintiff for mandatory injunction and electing to stand upon said answer, judgment is

rendered for the plaintiff as prayed for in said application for mandatory injunction upon the evidence offered and considered, and plaintiff is not required to give bond to put this judgment into effect. It is further ordered and adjudged by the court that defendant be, and he is hereby, enjoined from in any manner entering upon the premises described in plaintiff's application for injunction or exercising any further control or possession over the same, except for the purpose of removing his improvements from the same, and defendant is given 30 days within which to move all his removable improvements, including buildings and fences, from said premises.

At defendant's request he is given thirty days within which to prepare and serve a case-made for the supreme court, plaintiff given ten days to suggest amendments thereto, case to be settled upon five days' notice by either party.

It is further ordered that defendant have ten days' time within which to make and file his bond for the stay of execution herein in the sum of three hundred dollars, and in case said bond be
21 given and approved by the clerk of this court and said appeal filed in the supreme court of the Territory within sixty days, then defendant is to retain possession of the five acres of said premises described in the temporary order of injunction herein pending said appeal.

Said bond to be conditioned for the payment of all costs which the defendant may be adjudged to pay and for all damages occasioned by his use and occupancy of said five acres during the pendency of said appeal.

A. G. C. BIERER, *Judge.*

And afterwards and on the 6th day of March, 1897, said defendant filed his bond for the stay of execution upon said judgment; which bond was duly approved by the clerk of said court on the 6th day of March, 1897, and which said bond is in the words and figures following, to wit:

In the District Court of Kay County, Territory of Oklahoma.

WALTER P. JACKSON, Plaintiff,
vs.
E. F. BLACK, Defendant.

Undertaking on Appeal.

E. F. Black, as principal, and T. K. Bell, as sureties, hereby acknowledge themselves bound to the plaintiff herein, Walter P. Jackson, in the sum of three hundred dollars, upon the following conditions:

Whereas the said plaintiff on the 26th day of February, 1897, recovered a judgment against the defendant, E. F. Black, for an injunction removing said defendant from the premises described in plaintiff's petition in said action, and the court, at the time of rendering said judgment, further ordered and adjudged that said

defendant be allowed sixty days within which to file an ap-
22 peal in the supreme court of the Territory of Oklahoma for the reversal of said judgment, and in case said appeal was so filed, then defendant to be allowed to retain the possession of five acres of said premises, as described in the temporary order of injunction in said cause, including the house and surrounding improvements of defendant during the pendency of said appeal:

Now, therefore, if said defendant shall duly prosecute his appeal in said action within the time limited by said order, and duly pay all costs that may be adjudged against him in said cause, and duly comply with all orders or judgments of the court rendered therein, and pay to said plaintiff all damages occasioned by the detention and occupancy of said five acres and improvements during the pendency of said action, in case the judgment of the district court shall be finally affirmed, and abide the judgment of the court, then this obligation to be void; otherwise to remain in full force and effect.

Witness our hands this 4th day of March, 1897.

(Signed) E. F. BLACK.
T. K. BELL.
W. G. JONES.
D. F. SPARKS.

Endorsed: Filed and approved this 6th day of March, 1897. J. H. Havighorst, clerk. F. M. Beale, dep.

TERRITORY OF OKLAHOMA, } ss:
Kay County, }

I hereby certify that the foregoing copy of petition, copy of answer, copy of demurrers, copy of amended answer, copy of journal entry, copy of undertaking on appeal, are each and all true, correct, and exact copies of the originals now on file and of record in my office.

Dated this 17th day of March, 1897.

[SEAL.] J. H. HAVIGHORST, *Clerk*,
By F. M. BEALE, *Dep.*

Fees on transcript, $6.95.

23 The foregoing contains a true and correct statement and copy of all the pleadings, motions, orders, findings, and proceedings upon which judgment was rendered.

G. J. MECHLING AND
S. H. HARRIS,
Attorneys for Plaintiff in Error.

TERRITORY OF OKLAHOMA, } ss:
Noble County, }

I, the undersigned, attorney for the plaintiff in the foregoing suit, hereby certify that the foregoing case-made and certified copy of record of proceedings in said cause was duly served on me this 10th day of March, 1897, and that the same contains a true and correct

copy of all the pleadings, motions, orders, findings, and proceedings upon which judgment was rendered, as well as a true copy of all orders of the court in reference thereto, as well as the undertaking of defendant on appeal; and I hereby waive all time for submitting amendments to said case and certified record, and agree that the same may be signed and settled without further notice.

E. BEE GUTHREY,
Attorney for Plaintiff.

TERRITORY OF OKLAHOMA, *Kay County,* } ss:

This is to certify that the foregoing above case-made and the amendments thereto have been duly served in due time and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause.

That the same as above set forth and corrected by me is true and correct statement of all the pleadings, motions, orders, findings, proceedings, and judgment had in said case, and I hereby
24 settle, allow, and certify the same as true and correct, and hereby order that the clerk of the district court attest the same with the name and seal of said court and file the same of record as provided by law.

Witness my hand, at Pawnee, Pawnee county, in said Territory, this the 27th day of March, 1897.

A. G. C. BIERER,
Judge of District Court.

Attest:
[SEAL.] JOHN H. HAVIGHORST, *Clerk.*

Filed March 27, 1897.

J. H. HAVIGHORST.

Said petition in error and case-made thereto attached is indorsed on back as follows: No. 572. E. F. Black, plaintiff in error, *vs.* W. P. Jackson, defendant in error. "Case-made." Filed April 10th, 1897. Edgar W. Jones, clerk. S.

25

FEBRUARY 18TH, 1898.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error. } No. 572.

The above cause coming on for disposition, the court being fully advised in the premises, it is considered, ordered, and adjudged that the same be in all things affirmed; to which the plaintiff in error excepts; exception allowed.

26 In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error. } No. 572.

Syllabus.

1. Injunction — Homesteads — When granted. — Where adverse claimants are residing upon a tract of land and each claiming the same as a homestead, by virtue of priority of settlement, and the Land Department makes a final award thereof, the losing party cannot properly claim the right to continue his residence upon the land for the purpose of bringing a suit in equity to declare a trust against his successful adversary when he has already resided upon the land a sufficient length of time under the law to enable him to make final proof for the land.

Error from Kay county. Affirmed.

S. H. Harris and G. J. Mechling, attorneys for appellant; Howe & Guthrie, attorneys for appellee.

The opinion of the court was delivered by DALE, C. J.:

This case comes here from Kay county to reverse the ruling of the lower court upon a demurrer. It appears from the record before us that Walter P. Jackson filed a petition in the district court for an injunction, prohibitive and mandatory, against E. F. Black, praying that Black be prohibited from further trespassing on or interfering with his possession of the S. W. ¼ of sec. 26, T. 28, R. 2 east, land situated in Kay county, and further asking that Black be required to remove from said land. Jackson alleged that he had a homestead filing upon the tract of land above described.

To this petition Black answered by stating in substance
27 that he had resided upon the tract of land since about September 16th, 1893, at which date he settled upon and claimed the land as his homestead; that he filed a homestead entry thereon on October 31st, 1893; that in a contest in the local land office and Interior Department it had been finally determined that Jackson settled upon the tract in dispute prior in point of time to his, Black's settlement, and for that reason alone his homestead filing was cancelled and Jackson awarded the right to file upon the land; that during his residence upon the tract in dispute he, Black, had made improvements thereon to the value of $500.00; that he is in all respects qualified under the laws of Congress to acquire a homestead; that Jackson is not qualified to obtain title to the land as a homestead for the reason that he entered upon the land in violation of sec. 10 of the act of Congress approved March 3rd, 1893; that at the hearing of the case in the local land office it was conclusively shown and admitted by Jackson that he, Jackson, on September 16th, 1893, the day upon which the Cherokee outlet was opened to settlement, started upon the race for land from the south line of the

Chilocco reservation, such place of starting being three and one-half miles south of the north boundary line of the Chereokee outlet; and it is claimed by Black that the facts so proved and admitted forever disqualified Jackson from acquiring any right to the land by reason of the prohibition contained in sec. 10, *supra*. It is further alleged that the only questions involved in the land contest were those of prior settlement and the qualification of Jackson to make a homestead entry, and, notwithstanding Jackson's proved and admitted disqualification, the local land office, the Commissioner of the General Land Office, and the Secretary of the Interior decided in favor of
28 Jackson upon both the question of priority of settlement and the qualifications of Jackson to file a homestead entry for the land; that upon the latter proposition the Land Department misapplied the law, and by reason of such mistake alone awarded the land to Jackson and cancelled Black's entry; that he, Black, is entitled to the land under the law and is desirous of bringing action in the proper court to have Jackson declared his trustee, but until Jackson shall have made his final proof for the land and the Government has parted with its title the courts have no jurisdiction of that character of a case; that if he is removed from the land Jackson will sell his homestead right to another, thereby depriving Black of his right to bring the action in the courts; that he is only desirous of retaining possession of about five acres of the land, occupied by his dwelling and improvements made surrounding the same, until such time as Jackson shall make final proof, and avers his willingness to give sufficient bond to indemnify Jackson against any loss which may occur by reason of his occupancy of such tract of land. He further claims that the land is worth $6,000.00, and that if he is removed Jackson will sell and relinquish his claim and the same will be entered by some person who is qualified under the law to take a homestead.

A demurrer was interposed to the answer and sustained, and by its judgment Black was enjoined from further entering upon the land except for the purpose of removing his improvements. The only question for our determination in this case is whether or not the answer of Black sets up such a defense as will justify the court in refusing injunction as prayed.

This court has held in Woodruff *vs.* Wallace, 3 Okla., 355, that—

29 "District courts of this Territory have jurisdiction to inquire into the right of possession as between settlers upon public lands, and where it appears that the rights of adverse claimants have been adjudicated by the Land Department, and the homestead entry of one of the parties cancelled, the district court may, by injunction, give exclusive possession to the person who was successful in the contest proceedings."

In that case, however, all of the matters in dispute between the parties were questions of fact, and the facts as found by the Land Department are binding upon the courts.

Johnson *vs.* Towsley, 13 Wall. U. S., 72.

Leo *vs.* Johnson, 116 U. S., 48.

In this case, upon the question of prior settlement, the finding by the Land Department in favor of Jackson is conclusive upon the courts, but it does not follow that the courts will also be governed upon questions of law as announced by the Land Department. On the contrary, the courts do have jurisdiction to correct mistakes of law, if any occur, and to award land to the party who may, under the laws of Congress, be entitled thereto.

Johnson *vs.* Towsley, *supra.*

But this jurisdiction never obtains in the courts until after the title to the land has passed from the United States and the question becomes one of private rights. It therefore follows that the courts cannot now interfere to compel the Land Department to reinstate Black's homestead filing or in any manner to interfere with the intention of the Land Department to permit Jackson to make final entry for the disputed tract and to receive a patent therefor.

In the case under consideration it is alleged in the answer of Black that Jackson can never acquire a legal title to the tract of land in dispute by reason of having entered the Cherokee outlet in violation of the act of Congress and the President's proclamation in opening the land to settlement, and that if he, Black, is removed from the land Jackson will sell or relinquish his rights to the claim to some person who is qualified to enter the land, and thereby prevent Black from ever asserting his claim in the courts; that if he is permitted to retain a small portion of the land any person purchasing will take the land with notice of his claim, etc.

From an examination of the practice of the land tribunal we find no provision for a *lis pendens* notice and no rule whereby notice of an adverse claim might be effectual to guard against the threatened danger, and if we were of the opinion that the only way by which Black could protect his rights would be by remaining upon the land until Jackson receives a patent therefor, we would hesitate somewhat about affirming the judgment of the lower court, unless, after a careful review of the legal questions involved, we reached the conclusion that Jackson's qualifications to enter were beyond reasonable dispute; but we cannot agree with the contention of counsel that the removal of Black will jeopardize his rights in the land. It is alleged in the answer of Black that he settled upon the land about September 16th, 1893, and that he has resided thereon continuously since that date, and has valuable improvements upon the land. Under the law opening the Cherokee outlet to settlement, sec. 19, page 336, vol. 28, U. S. Stats. at Large, the right to make final proof for lands in the Cherokee outlet is extended to all *bona fide* settlers upon lands at the expiration of 14 months from the date of their settlement. This being the law, Black may at any time, if he so desires, make his final proof at the local land office, and although such proof will be rejected, yet it is all the law requires upon his part, and is sufficient to protect him against any stranger who initiates a right subsequent in point of time to that of his; and in case Jackson receives the patent, he can as well prosecute

his action to declare Jackson his trustee while off as upon the land.

31 For the reasons above stated the judgment of the trial court is affirmed. Tarsney, J., concurring; Bierer, J., presided at the hearing of the cause in the court below, not sitting; Keaton and McAtee dissenting.

32 Filed March 9th, 1898.

In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error. } Petition for Rehearing.

The plaintiff in error, E. F. Black, petitions the court for a rehearing and an opportunity to reargue and brief the above entitled case for the following reasons:

First. That the said decision of this court in the above-entitled cause amounts to an affirmance of the judgment of the lower court by an even division of the judges competent to sit, and does not at present amount to a precedent for other cases, while in fact this case was taken to the supreme court as a test case and with a view to carrying the same to the Supreme Court of the United States, if necessary, and involves the identical question arising in about thirty other cases in the county from which this case was taken by proceeding in error, and, in addition, the decision in this case by the two judges Dale and Tarsney is known to be contrary to the views of the former associate justice, the Honorable A. G. C. Bierer, which practically makes the same a minority decision.

Second. The court erred in finding and holding that the controversy between the parties hereto was originally one of prior settlement, as any question which might have existed upon the ground of prior settlement was fully and finally disposed of in the Land Department, and the sole question is the right of the defendant in error to oust the plaintiff in error from the possession of the land and deprive him of all means of conveying notice to any person who may hereafter and after relinquishment of the defendant in error has been filed in the land office make homestead entry

33 for and acquire title to the land.

Third. The court erred in finding and holding that Black's remedy is by making final proof for the land, because Black's homestead entry having been canceled, his application to make final proof would not be allowed, and even if he appealed from such holding and such appeal was allowed by the local office, the proceeding must at some time be determined, and the determination of such proceeding would reduce the same to a level with Black's former claims for the land, including his homestead entry, and the record of the Land Department would show that Black had no claim pending for the land, at which time Jackson could as well

relinquish and deprive Black of his rights as he can at the present time.

Fourth. The court erred in holding that equity will oust a man from the pos-session of land and either directly or indirectly extinguish his rights therein at the suit of one who has no legal title, and, as a plain proposition of law, never can acquire a legal title, and upon the admitted facts in the case has no intention of acquiring a legal title to the land, but, on the contrary, intends to get possession thereof and render Black helpless to give notice of his rights, and then relinquish for a consideration to a person, a stranger to Jackson's disqualification. The admitted facts in the record show that Jackson intends to and will transfer his wrongfully acquired possession of the land into a consideration of six thousand dollars; while, on the other hand, to leave Black upon the land where his possession would be notice to all of his rights cannot possibly result in injury or damage to Jackson.

In the case of H. W. Sanford, plaintiff in error, *vs.* C. W. Sanford, Book 35, Lawyer's Co-operative Edition U. S. Supreme Court
34 Reports, the Supreme Court of the United States, by Justice Field, uses the following language: "Where the officers of the Land Department have misconstrued the law and denied the parties their rights, or where misrepresentations and fraud have been practiced necessarily affecting their judgment, the courts can interfere so as to secure the just rights of the parties." The object and purpose of Black's contention was overlooked by this court and the law misconstrued in the controlling decision and settled law as laid down in the case of Cornelius *vs.* Kessel, Book 32, Lawyers' Co-operative Edition U. S. Reports, page 482, wherein it is held that where one has complied with the laws of the United States and done all that is required of him in the effort to acquire title to Government land, and his entry is canceled by the Land Department contrary to law, that he can maintain a suit in equity to have the title acquired by another person transferred to him, provided the person who acquired the title had notice of the rights of the first claimant. In this connection the court makes use of the following language: "The legal title, it is true, was retained by them (the United States), but they held it as trustee for the benefit of the purchaser, and they were bound upon proper application to issue to him a patent therefor. If from inadvertance or mistake as to their rights, or other cause, they afterwards conveyed that title to another, the grantee with notice took it subject to the equitable claim of the first purchaser, who could compel its transfer to him. In all such cases a court of equity will convert the second purchaser into a trustee of the true owner and compel him to convey the legal title." See also authorities cited in this case.

If the so-called mandatory injunction has a rightful foundation in necessity, an equally urgent necessity should either limit
35 its powers or extend in its support other principles of law and equity, so that wrong and injustice may not be done.

The court appears to have also overlooked or misconstrued the case of Laughlin *vs.* Fariss, decided by this court September the 3rd, 1897,

50 Pac., 254. See also authorities cited in dissenting opinion of Justice Bierer in the case of Sproat *vs.* Durlin, 2nd Okla., 45.

Fifth. The court erred in holding that possession of real estate is not notice of all the rights of the possessor, and that the question of notice in such cases depends upon the rules and laws of the Land Department, and therein overlooked the established law that possession of real estate is notice sufficient to put all persons upon inquiry and to charge them with notice of all the rights of the possessor which might have been ascertained by reasonable inquiry.

From the consideration of the original brief of plaintiff in error herein, together with the case of Smith *vs.* Townsend, Book 37, Lawyers' Co-operative Edition U. S. Reports, page 533, it must be entirely clear that Jackson can never acquire title to the land in question as a homesteader, and if such is the law he should not be assisted in his admitted attempt to rob Black of six thousand dollars, the value of the land, even though such effort be made in the broad and charitable name of equity. Even if it is not clear that Black will be entitled to the land as soon as the patent issues from the Government, by reason of the disqualification of Jackson, he ught to be permitted to maintain his existing rights so that he can finally submit the legal proposition to a court of equity with jurisdiction to finally determine the question.

Sixth. The two justices, Dale and Tarsney, in the opinion delivered in this case, close with the following language: "And
36 in case Jackson receives the patent he (Black) can as well prosecute his action to declare Jackson his trustee while off as upon the land." From this it is evident that the honorable justices misunderstood the controversy in this case. Black does not contend that he must be upon the land in order to entitle him to prosecute his action against Jackson after the patent issues—that is, I do not contend that Black's presence upon the land after patent issues is essential to maintain his action against the patentee, but his presence upon the land until the patent issues and he has had time to begin suit against the patentee is essential to preserve his right to maintain the suit and prevent the relinquishment by Jackson as set forth in the answer in the record, and the only injury that can possibly result to Jackson or any other person from granting the prayer of Black must result from Black's action commenced after the patent issues to acquire title to the home which he has improved and which should have been awarded to him by the Land Department and would have been so awarded if the law in relation to Jackson's qualification had been properly construed.

Wherefore plaintiff in error prays a rehearing and reconsideration of said cause and relief as demanded in his petition in error herein.

S. H. HARRIS,
Attorney for Plaintiff in Error.

I hereby accept service of the foregoing petition for rehearing

and acknowledge the receipt of a true copy this 5th day of March, 1898.

E. BEE GUTHREY,
Attorney for Defendant in Error.

Endorsed: Filed March 9th, 1898. Edgar W. Jones, clerk. K.

37 In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error. } No. 572.

Order.

Now, on this 11th day of June, A. D. 1898, said cause coming on for decision upon the application of the plaintiff in error for a rehearing, and the court having had said matter under advisement and being sufficiently advised in the premises—

It is therefore by the court considered, ordered, and decreed that said application for a rehearing be, and the same is hereby, overruled; to which ruling the said plaintiff in error duly excepted.

38 Endorsed: Filed June 23rd, 1898. Benj. F. Hegler, clerk sup. ct., by M. E. Ketsch, dep'y.

In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error. } No. 572. Petition for Appeal.

The above-named plaintiff in error, conceiving himself aggrieved by the several judgments entered in this case, to wit, the judgment entered herein on the twelfth day of February, A. D. 1898, confirming the judgment of the district court of the county of Kay and Territory of Oklahoma, in the premises, and also the judgment entered herein on the eleventh day of June, A. D. 1898, overruling the petition and application of the plaintiff in error for a rehearing, does hereby appeal from said orders and decrees and each and both of the same to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this his appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said orders were made, duly authenticated, may be sent to the Supreme Court of the United States, and that the court may fix the supersedeas bond of the said appellant to be given within a reasonable time, and enter all necessary orders herein allowing the foregoing appeal.

S. H. HARRIS AND
ASP, SHARTEL & COTTINGHAM,
Solicitors for Plaintiff in Error.

39 TERRITORY OF OKLAHOMA, } ss:
Supreme Court, }

S. H. Harris, of lawful age, being first duly sworn, upon his oath deposes and says that he is one of the attorneys in the above-entitled cause, and knows the nature of said controversy therein, and that there is more than five thousand dollars ($5,000.00) involved in said appeal, exclusive of costs.

S. H. HARRIS.

Subscribed in my presence and sworn to before me this twenty-third day of June, 1898.

[SEAL.] BENJ. F. HEGLER,
Clerk Supreme Court.

Endorsed: Filed June 23, '98. Benj. F. Hegler, clerk sup. ct., by M. E. Ketsch, dep'y.

40 In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error.

Affidavit.

TERRITORY OF OKLAHOMA, } ss:
Kay County, }

T. J. Harris, of lawful age, being first duly sworn, upon oath states that he is a resident of the county of Kay, Territory of Oklahoma; that he is well acquainted with the land in controversy in this action, and is well acquainted with the value of the relinquishment thereof and the value of relinquishments of and homestead filings upon said land and similar lands in the same locality; that the relinquishment of the homestead entry upon said land and the right to file a homestead entry thereon is well worth the sum of six thousand dollars ($6,000.00) and could readily be sold for that amount; that the actual amount in controversy in this action is the sum of six thousand dollars ($6,000.00).

T. J. HARRIS.

Subscribed and sworn to before me this 9th day of July, 1898.

[SEAL.] W. G. JONES,
Notary Public.

My com. exp. May 11th, 1902.

Endorsed: Filed July 13, '98. Benj. F. Hegler, clerk sup. ct.

41 In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error.

Affidavit.

TERRITORY OF OKLAHOMA, *Kay County,* } ss:

W. P. Franklin, of lawful age, being first duly sworn, upon his oath states that he is a resident of Kay county, Territory of Oklahoma, and has been such resident since the 16th day of September, 1893; that he is well acquainted with the land in question in this action, and is well acquainted with the value of the relinquishment of said land and similar lands in said county and Territory; that the relinquishment of the entry upon said land and the right to file a homestead entry thereon is now and has been since the commencement of this litigation well worth the sum of six thousand dollars ($6,000.00) and could readily be sold for that sum.

W. P. FRANKLIN.

Subscribed and sworn to before me this 9 day of July, 1898.

[SEAL.] W. G. JONES,
Notary Public.

My com. exp. May 11, 1902.

Endorsed: Filed July 13, 1898. Benj. F. Hegler, clerk sup. ct.

42 In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error.

Affidavit.

TERRITORY OF OKLAHOMA, *Kay County,* } ss:

J. Thomas, of lawful age, being first duly sworn, upon his oath states that he is a resident of Kay county, Territory of Oklahoma, and has been such resident since the 16th day of September, 1893; that he is well acquainted with the land in question in this action and is well acquainted with the value of the relinquishment of said land and similar lands in said county and Territory; that the relinquishment of the entry upon said land and the right to file a homestead entry thereon is now and has been since the commencement of this litigation well worth the sum of six thousand dollars ($6,000.00) and could readily be sold for that sum.

J. THOMAS.

Subscribed and sworn to before me this 9th day of July, 1898.

W. G. JONES,
Notary Public.

[SEAL.]

My com. exp. May 11, 1902.

Endorsed: — July 13, '98. Benj. F. Hegler, clerk sup. ct.

43 In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error.

Affidavit.

TERRITORY OF OKLAHOMA, *Kay County,* } *ss:*

J. R. Potts, of lawful age, being first duly sworn, upon oath states that he is a resident of the county of Kay, Territory of Oklahoma; that he is well acquainted with the land in controversy in this action and is well acquainted with the value of the relinquishment thereof and the value of the relinquishments of and homestead filings upon said land and similar lands in the same locality; that the relinquishment of the homestead entry upon said land and the right to file a homestead entry thereon is well worth the sum of six thousand dollars ($6,000.00), and could readily be sold for that amount; that the actual amount in controversy in this action is the sum of six thousand dollars ($6,000.00), which affiant has heard offered for the same.

J. R. POTTS.

Subscribed and sworn to before me this 9 day of July, 1898.

W. G. JONES,
Notary Public.

[SEAL.]

My com. exp. May 11, 1902.

Endorsed: Filed July 13, '98. Benj. F. Hegler, clerk sup. ct.

44 The foregoing claim of appeal is allowed in open court by order of court this twenty-third day of June, A. D. 1898.

JNO. H. BURFORD,
Chief Justice.

Attest:
[SEAL.] BENJ. F. HEGLER,
Clerk Sup. Ct.

In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error. } No. 572.

Assignment of Error on Appeal.

Now, on this twenty-third day of June, A. D. 1898, comes the said plaintiff in error, E. F. Black, by S. H. Harris and Asp, Shartel & Cottingham, his solicitors, and says that the decree entered in said cause on the twelfth day of February, A. D. 1898, affirming the judgment of the court below, and the decree of the eleventh day of June, A. D. 1898, entered therein respectively, are each and both erroneous and against the justice and rights of the said plaintiff in error for the following reasons, to wit:

45 First. The said court erred in affirming the judgment of the court below.

Second. The court erred in overruling the petition and application of the said plaintiff in error for a rehearing in said cause.

Third. Because the petition of the plaintiff in the court below did not state facts sufficient to entitle the plaintiff in the court below to the relief demanded.

Fourth. Because the court did not have jurisdiction to enter the decree complained of and had no right to assume jurisdiction to determine the rights of possession between different claimants of lands belonging to the United States, and had no right to assume jurisdiction to award the plaintiff the possession thereof or to dispossess the said defendant in the court below, and this court erred in sustaining the action of the court below in the premises.

Fifth. Because the land in controversy is public land belonging to the United States, and to which the United States has not parted with its title or in any way divested itself thereof, and because the court below erroneously assumed jurisdiction in the premises, and this court erroneously affirmed its said action.

Sixth. Because the said petition of the plaintiff and the answer of the defendant in the court below showed that the said plaintiff, the defendant in error in this court, was disqualified from acquiring any rights to the ownership or possession of the land in controversy, and that if the court otherwise possessed jurisdiction, having entered the lands opened to settlement in violation of law, he was a wrong-doer and entitled to no equitable relief.

Wherefore the said plaintiff in error prays that the said decrees and each of them be reversed, and that the said court may be directed to enter a decree reversing the said cause and re-

46 manding the same to the district court of the county of Kay and Territory of Oklahoma for further proceedings in accordance with law.

S. H. HARRIS AND
ASP, SHARTEL & COTTINGHAM,
Solicitors for Plaintiff in Error.

Indorsed: Filed June 23rd, '98. Benj. F. Hegler, clerk sup. ct., by M. E. Ketsch, deputy.

47 JUNE 23, 1898.

In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error. } No. 572.

Order.

Now, on this 23rd day of June, A. D. 1898, comes S. H. Harris and Asp, Shartel & Cottingham, solicitors for the plaintiff in error in this cause, and present to the court the application of the plaintiff in error for an appeal to the Supreme Court of the United States from the original judgment rendered herein affirming the judgment of the court below, and from the subsequent judgment or decree overruling and denying the application of the plaintiff in error for a rehearing thereon.

And the plaintiff in error having filed with said application for an appeal his assignment of errors and presented said application in open court, it is by the court ordered that the said appeal to the Supreme Court of the United States be, and the same is hereby, granted, and the clerk of this court is hereby directed to certify a full, true, and complete transcript of the record of this court to the Supreme Court of the United States.

And upon the further application of the said plaintiff in error that the amount of his supersedeas bond be fixed to supersede the judgment of this court in the premises, it is by the court ordered

48 that upon the giving of an undertaking in the sum of one thousand dollars ($1,000.00), to be approved by the chief justice of this court, within ten days from this date, the said appeal shall operate as a supersedeas, and the chief justice of this court is further directed to attest and sign the citation in said cause on such appeal.

JNO. H. BURFORD,
Chief Justice.

Endorsed: Filed June 23, '98. Benj. F. Hegler, clerk sup. ct.

49 In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error. } Undertaking on Appeal.

Know all men by these presents that we, E. F. Black, as principal, and J. E. Ritchey, John H. Pearce, B. K. Rinehart, Logan Wyatt, D. F. Sparks, Wm. Burns, A. White, T. K. Bell, and G. W. Riley, as sureties, are held and firmly bound unto the defendant, Walter P. Jackson, in the full and just sum of one thousand dollars ($1,000.00),

to be paid to the said Walter P. Jackson, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 30th day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a session of the supreme court of the Territory of Oklahoma, in a suit depending in said court between E. F. Black, the plaintiff in error, and Walter P. Jackson, as defendant in error, a decree was rendered against the said E. F. Black, and the said E. F. Black having appealed therefrom to the Supreme Court of the United States, and having filed the said appeal in the office of the clerk of said court to reverse the said judgment in the aforesaid suit, and procured citation to issue to the said Walter P. Jackson, citing and admonishing him to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, on the twenty-third day of July next:

50 Now, the condition of the above obligation is such that if the said E. F. Black shall prosecute said appeal to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

E. F. BLACK.
J. E. RICHEY.
JOHN H. PEARCE.
WM. BURNS.
A. WHITE.
T. K. BELL.
B. K. RINEHART.
LOGAN WYATT. $100.00.
D. F. SPARKS.
G. W. RILEY.

Approved July 2nd, 1898.

JNO. H. BURFORD,
Chief Justice.

Attest: BENJ. F. HEGLER,
Clerk Sup. Ct.,
By M. E. KETSCH,
[SEAL.] *Deputy.*

Endorsed on back as follows: 572. In the supreme court of the Territory of Oklahoma. E. F. Black, pl'ff in error, *vs.* Walter P. Jackson, def't in error. Undertaking on appeal. Filed July 2, '98. Benj. F. Hegler, clerk sup. ct., by M. E. Ketsch, deputy.

51 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, *Supreme Court of Oklahoma,* } ss:

To Walter P. Jackson, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be held in the city of Washington, on the 23rd day of July next, pursuant to an appeal filed in the office of the clerk of the supreme court of the Territory of Oklahoma, wherein E. F. Black is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this twenty-third day of June, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third.

JNO. H. BURFORD,
Chief Justice of Oklahoma Territory.

Attest:
[SEAL.] BENJ. F. HEGLER, *Clerk.*

I hereby accept service of the foregoing citation this 24th day of June, 1898.

E. BEE GUTHREY,
Attorney for Walter P. Jackson.

Indorsed: Filed July 2, '98. Benj. F. Hegler, clerk sup. ct., by M. E. Ketsch, deputy.

52 UNITED STATES OF AMERICA, *Territory of Oklahoma,* } ss:

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify the above and foregoing papers, numbered from one to 52, all numbers inclusive, to be a full, true, perfect, and complete transcript and copy of the record, papers, and proceedings, and of all thereof filed or had and entered of record in said court and in a certain cause lately in said court pending, wherein E. F. Black was plaintiff in error and Walter P. Jackson was defendant in error, as fully and completely as the same still remain on file or of record in my office at Guthrie, Oklahoma Territory.

I further certify that the original citation herein is hereto attached and herewith returned together with acceptance of service thereof duly endorsed thereon.

In testimony to the above I do hereunto sign my name and affix

the seal of said court, at Guthrie, in said Territory, this 14th day of July, 1898.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court.

[Two-cent U. S. internal-revenue stamp, canceled July 14, 1898, B. F. H.]
[Two-cent U. S. internal-revenue stamp, canceled July 14, 1898, B. F. H.]
[Two-cent U. S. internal-revenue stamp, canceled July 14, 1898, B. F. H.]
[Two-cent U. S. internal-revenue stamp, canceled July 14, 1898, B. F. H.]
[Two-cent U. S. internal-revenue stamp, canceled July 14, 1898, B. F. H.]

53 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, *Supreme Court of Oklahoma,* } *ss:*

To Walter P. Jackson, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be held in the city of Washington, on the twenty-third day of July next, pursuant to an appeal filed in the office of the clerk of the supreme court of the Territory of Oklahoma, wherein E. F. Black is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this twenty-third day of June, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third.

JNO. H. BURFORD,
Chief Justice of Oklahoma Territory.

[Seal Supreme Court, Territory of Oklahoma.]

Attest: BENJ. F. HEGLER, *Clerk.*

I hereby accept service of the foregoing citation this 24 day of June, 1898.

E. BEE GUTHREY,
Att'y for Walter P. Jackson.

Filed July 13, 1898.

BENJ. F. HEGLER,
Clerk Sup. Ct.

[Endorsed:] 572. In the Supreme Court of the United States. Citation to Walter P. Jackson. Filed July 2, '98. Benj. F. Hegler, clerk sup. ct., by M. E. Ketsch, deputy.

[Endorsed:] 572. E. F. Black, pl'ff in error, *vs.* Walter P. Jackson, def't in error. Transcript from supreme court, Oklahoma Territory.

Endorsed on cover: Case No. 16,936. Oklahoma Territory supreme court. Term No., 351. E. F. Black, appellant, *vs.* Walter P. Jackson. Filed July 29th, 1898.